

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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In The Matter of the Application of  
San Diego Gas & Electric Company  
(U902E) for a Permit to Construct Electrical  
Facilities: Cleveland National Forest Power Line  
Replacement Projects.

Application 12-10-009  
(Filed October 17, 2012)

**APPLICATION OF THE PROTECT OUR COMMUNITIES FOUNDATION AND  
CLEVELAND NATIONAL FOREST FOUNDATION FOR REHEARING OF  
DECISION 16-05-038**

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DECISION 16-05-038**

Pursuant to Public Utilities Code sections 1731- 1736 and Rule 16.1 of the Commission’s Rules of Practice and Procedure, parties The Protect Our Communities Foundation (“POC”) and Cleveland National Forest Foundation (“CNFF”) apply for rehearing of Decision 16-05-038 (“D.16-05-038” or “Decision”) on A.12-10-009, the Application of San Diego Gas & Electric Company for a Permit to Construct Electrical Facilities: Cleveland National Forest Power Line Replacement Projects.<sup>1</sup> Pursuant to Rules 16.2 and 14.5, POC filed a protest on July 26, 2013,<sup>2</sup> and Administrative Law Judge (“ALJ”) Hallie Yacknin granted CNFF’s oral motion for party status on March 17, 2014.<sup>3</sup> Accordingly, POC and CNFF are parties to the proceeding eligible to apply for rehearing.<sup>4</sup> This application for rehearing is timely because it is filed and served on the first business day following 30 days after the date the Commission mailed the decision, June 10, 2016.<sup>5</sup>

**I. Introduction**

Decision 16-05-038 allows San Diego Gas & Electric Company (“SDG&E”) to move ahead with its \$1 billion plan to replace nearly 150 miles of lines and over 2,100 utility poles in and around the Cleveland National Forest (“CNF”). In approving this massive infrastructure

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<sup>1</sup> Unless otherwise indicated, all further references to rules in this application for rehearing are to the Commission’s Rules of Practice and Procedure and all statutory references are to the Public Utilities Code.

<sup>2</sup> Protest and Request for Hearing of POC (July 26, 2013) (“POC Protest”).

<sup>3</sup> Assigned Commissioner’s Scoping Memo and Ruling (Mar. 17, 2014) (“Scoping Memo”).

<sup>4</sup> Rule 16.2(a).

<sup>5</sup> Rule 16.1(a).



project without any consideration of cost or need, the Commission violated its statutory and constitutional obligations to ensure fairness in utility rates. Furthermore, in issuing the Decision, the Commission failed to comply with its obligation under the California Environmental Quality Act (“CEQA”)<sup>6</sup> to analyze and mitigate the significant environmental impacts of projects it approves. The procedure used to reach the Decision was not in compliance with the law and the resulting Decision is void for material, procedural, and substantive error. The Commission has acted in excess of its powers or jurisdiction; has not proceeded in the manner required by law; and has abused its discretion. Furthermore, the decision is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record. Thus, POC and CNFF respectfully request that the Commission grant this application for rehearing.

## **II. Background**

In A.12-10-009, SDG&E sought approval from the Commission<sup>7</sup> for the reconstruction of over 148 miles of five 69 kilovolt (“kV”) transmission lines in San Diego County.<sup>8</sup> The Cleveland National Forest Power Line Replacement Projects (“Project”) will cost ratepayers nearly \$1 billion, even though the Project is not required by the California Independent System Operator (“CAISO”), the Commission, or any other government agency.<sup>9</sup> The Project entails replacement of over 2,100 wooden poles with significantly taller, steel poles.<sup>10</sup> Construction is planned to last over 5 years<sup>11</sup> and will use at least 5 to 10 million gallons of water.<sup>12</sup> SDG&E

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<sup>6</sup> CEQA is codified at Pub. Resources Code § 21000 et seq.

<sup>7</sup> SDG&E also sought approvals from the U.S. Forest Service, the Bureau of Indian Affairs (“BIA”), and U.S. Bureau of Land Management (“BLM”), and California State Parks. D.16-05-038 at 6.

<sup>8</sup> D.16-05-038 at 3-4.

<sup>9</sup> The application estimates that the Project will cost \$418 million in 2012 dollars, plus the cost of environmental mitigations or other modifications the Commission may require. POC Opening Brief (Nov. 2, 2015) (“POC Op. Br.”) at 3-4. The Office of Ratepayer Advocates (“ORA”) estimates that total costs may exceed \$1 billion financed over the life of the Project. POC Op. Br. at 10.

<sup>10</sup> Final EIR/EIS for the Master Special Use Permit and Permit to Construct Power Line Replacement Projects (June 2015) (“EIR”) at B-4.

<sup>11</sup> EIR at B-37.

<sup>12</sup> EIR at B-59.

asserts the Project is needed to improve safety and reliability,<sup>13</sup> but the Project is not required by any system operator or government agency.<sup>14</sup>

POC and ORA filed protests requesting that the Commission hold public evidentiary hearings and develop a full and complete record of the facts and the law regarding the need for the Project.<sup>15</sup> POC warned that the Project “represents a significant upgrade in the potential capacity, cost, and environmental impact of the lines in question.”<sup>16</sup> Most, if not all, of the estimated cost of the Project will fall on SDG&E ratepayers.<sup>17</sup> POC and ORA both noted that less costly and equally effective alternatives to the Project are available and already required by state and federal agencies.<sup>18</sup> Accordingly, ORA argued that SDG&E should implement more cost-effective options before burdening the ratepayers with the costs of this Project.<sup>19</sup> However, despite party requests that the Commission require a Certificate of Public Convenience and Necessity (“CPCN”), rather than a Permit to Construct (“PTC”), the scoping memos for this proceeding excluded analysis of the need for and cost of the Project,<sup>20</sup> and the Commission denied party requests to develop a record on these issues.<sup>21</sup>

The Commission may only grant a PTC if it determines a project complies with CEQA.<sup>22</sup> The Commission, as the lead agency under CEQA, determined after initial study that the Project would have significant environmental impacts.<sup>23</sup> Accordingly, the Commission prepared a joint

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<sup>13</sup> Reply Comments of SDG&E (U 902E) to Opening Comments on Proposed Decision (May 23, 2016) at 4.

<sup>14</sup> See D.16-05-038 at 3 (Forest Service determined fire risk reduction measures and undergrounding should be *evaluated*); Protest by the Division of Ratepayer Advocates [now ORA] of the San Diego Gas and Electric Company’s Application for a Permit to Construct the Cleveland National Forest Power Line Replacement Projects (Nov. 26, 2012) (“ORA Protest”) at 3; Reporter’s Transcript of October 12, 2015 Evidentiary Hearing (“Transcript”) at 38 (SDG&E, Knowd.).

<sup>15</sup> POC Protest at 2-3; ORA Protest at 7; D.16-05-038 at 6-7.

<sup>16</sup> POC Protest at 3.

<sup>17</sup> ORA Protest at 3-4.

<sup>18</sup> POC Protest at 3; ORA Protest at 6.

<sup>19</sup> ORA Protest at 6.

<sup>20</sup> Scoping Memo; Assigned Commissioner’s Amended Scoping Memo and Ruling (Nov. 25, 2014) (“First Amended Scoping Memo”); Assigned Commissioner’s Second Amended Scoping Memo and Ruling (Aug. 13, 2015) (“Second Amended Scoping Memo”).

<sup>21</sup> Administrative Law Judge’s Ruling Denying Motion to Amend Scoping Memo and Providing Requested Clarification (Sept. 17, 2015) (“Ruling Denying Motion to Amend Scope”).

<sup>22</sup> D.16-05-038 at 5; General Order (“GO”) 131-D § B; Pub. Resources Code § 21000 et seq.

<sup>23</sup> D.16-05-038 at 5.

Environmental Impact Report/ Environmental Impact Statement (“EIR”) with the Forest Service (the lead agency under the National Environmental Policy Act (“NEPA”)).<sup>24</sup> The Final EIR was released in June 2015.<sup>25</sup>

On September 16, 2015, POC, CNFF, and Backcountry Against Dumps (“Backcountry”) served testimony related to issues in this proceeding,<sup>26</sup> which included analysis regarding the efficacy of the Project to improve system safety and reliability and addressed Project alternatives.<sup>27</sup> This testimony states that the Project is not needed, that there are numerous cost-effective alternatives to the Project available, and that the Project may actually increase fire risks in the Cleveland National Forest.<sup>28</sup> On September 21, 2015, SDG&E filed motions to strike this testimony.<sup>29</sup> Administrative Law Judge (“ALJ”) Hallie Yacknin largely granted SDG&E’s motions to strike,<sup>30</sup> but partially reversed this ruling after briefing.<sup>31</sup> ALJ Yacknin held one day of evidentiary hearings on October 12, 2015, at which the parties were permitted to cross-examine SDG&E witnesses on some limited issues.<sup>32</sup>

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<sup>24</sup> D.16-05-038 at 5-6.

<sup>25</sup> See EIR.

<sup>26</sup> Opening Testimony of Bill Powers, P.E., on Behalf of POC (Sept. 16, 2015); Testimony of Matthew Rahn, Ph.D., J.D., on Behalf of CNFF and Backcountry (Sept. 16, 2015); Prepared Direct Testimony of Mark Ostrander on Behalf of Backcountry and CNFF Regarding Issues 4 and 5 as Defined in the Assigned Commissioner’s Amended Scoping Memo and Ruling (Sept. 16, 2015); Testimony of Duncan McFetridge on Behalf of CNFF (Sept. 16, 2015).

<sup>27</sup> See Opening Testimony of Bill Powers, P.E., on Behalf of POC (Sept. 16, 2015) (“Powers Testimony”); Testimony of Matthew Rahn, Ph.D., J.D., on Behalf of CNFF and Backcountry (Sept. 16, 2015) (“Rahn Testimony”); Prepared Direct Testimony of Mark Ostrander on Behalf of Backcountry and CNFF Regarding Issues 4 and 5 as Defined in the Assigned Commissioner’s Amended Scoping Memo and Ruling (Sept. 16, 2015); Testimony of Duncan McFetridge on Behalf of CNFF (Sept. 16, 2015).

<sup>28</sup> See, e.g., Powers Testimony at 2-3, Rahn Testimony at 2-10.

<sup>29</sup> SDG&E’s Motion to Strike Opening Testimony of Bill Powers, P.E., on Behalf of POC (Sept. 21, 2015); SDG&E’s Motion to Strike (1) Prepared Direct Testimony of Mark Ostrander on Behalf of Backcountry and CNFF; and (2) Testimony of Matthew Rahn, Ph.D., J.D., on Behalf of CNFF and Backcountry (Sept. 21, 2015); SDG&E’s Motion to Strike Opening Testimony of Duncan McFetridge on Behalf of CNFF (Sept. 21, 2015).

<sup>30</sup> ALJ’s Ruling Granting Motions to Strike Prepared Direct Testimony of Ostrander, Rahn and McFetridge (Oct. 5, 2015).

<sup>31</sup> ALJ’s Ruling Reversing in Part Ruling Striking Prepared Testimony, and Settling Evidentiary Hearing (Dec. 3, 2015).

<sup>32</sup> See Second Amended Scoping Memo at 4; Transcript.

The parties filed concurrent opening and reply briefs in November 2015.<sup>33</sup> ALJ Yacknin issued a Proposed Decision on April 26, 2016,<sup>34</sup> and the parties filed opening and reply comments on the Proposed Decision in May 2016.<sup>35</sup> As it did throughout this proceeding, the Commission rejected the parties' final comments in short, conclusory responses.<sup>36</sup>

### **III. Standard of Review**

Rule 16.1(c) requires an application for rehearing to set forth the "grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous," with references to the record or law. Pursuant to section 1757, a decision is unlawful and is subject to judicial review where: (1) the Commission has acted without, or in excess of, its powers of jurisdiction; (2) the Commission has not proceeded in the manner required by law; (3) the Commission's decision is not supported by the findings; (4) the Commission's findings are not supported by substantial evidence in light of the whole record; (5) the Commission's decision was procured by fraud or was an abuse of discretion; or (6) the decision violates any right of the petitioner under the United States or California Constitution.<sup>37</sup>

If the Commission "fail[s] to comply with required procedures, appl[ies] an incorrect legal standard, or commit[s] some other error of law," its decision is reversible.<sup>38</sup> Pursuant to section 1705, Commission decisions "shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."<sup>39</sup> The California Supreme Court has explained that such "[f]indings are essential to 'afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily.'"<sup>40</sup>

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<sup>33</sup> D.16-05-038 at 9.

<sup>34</sup> Proposed Decision of ALJ Yacknin (Apr. 26, 2016). The Second Amended Scoping Memo required a proposed decision on or before February 16, 2016. Second Amended Scoping Memo at 5. However, the Commission delayed the proposed decision until after the Forest Service reached its decision on the Master Special Use Permit. *See* D.16-05-038 at 9.

<sup>35</sup> D.16-05-038 at 34.

<sup>36</sup> D.16-05-038 at 34-35.

<sup>37</sup> Pub. Util. Code § 1757(a).

<sup>38</sup> *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.

<sup>39</sup> Pub. Util. Code § 1705.

<sup>40</sup> *California Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59.

Substantial evidence is evidence of “ponderable legal significance,”<sup>41</sup> that is “reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion.”<sup>42</sup> It is not synonymous with “any evidence.”<sup>43</sup> Thus, a Commission decision will not be upheld if it is “devoid of evidentiary support” or “contrary to facts [which are] universally accepted as true.”<sup>44</sup> Critically, “in light of the whole record,” means the reviewing court “cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record.”<sup>45</sup> Instead, the Commission must consider all relevant evidence, which necessarily “involves some weighing of the evidence to fairly estimate its worth.”<sup>46</sup>

#### **IV. Argument**

The Commission failed to proceed in the manner required by law and abused its discretion when it refused to consider cost and need for the Project. Because the Commission refused to make any findings of fact or conclusions of law regarding need, and no rate increase can said to be just or reasonable for a project for which there is no demonstrated need, the Commission failed its statutory duty to ensure that rates are just and reasonable. The Commission also violated CEQA by approving a project with unmitigable environmental impacts based on an statement of overriding considerations that alleges project need and cost savings, after the Commission refused to consider these issues or make any findings supported by substantial evidence regarding need. The Commission’s failure to make findings of fact or conclusions of law regarding Project need and cost, “issues material to the order or decision,” is an additional procedural failure.<sup>47</sup> These violations demand a rehearing because the Commission abused its discretion and did not proceed in the manner required by law, the Decision is not

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<sup>41</sup> *People v. Johnson* (1980) 26 Cal.3d 557, 576 (internal citations omitted).

<sup>42</sup> *S. Coast Framing, Inc. v. Worker’s Compensation Appeal Bd.* (2015) 61 Cal.4th 291, at \*8 (quotation omitted).

<sup>43</sup> *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-52.

<sup>44</sup> *Larson v. State Pers. Bd.* (1994) 28 Cal.App.4th 265, 273.

<sup>45</sup> *Util. Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945, 959 (quotation omitted).

<sup>46</sup> *County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 555-58 (Assessment Board erred in determining the correct method of valuation to be the market value approach and then subsequently ignoring all competent evidence presented on market value, making its own determination of value based upon speculation and conjecture).

<sup>47</sup> See Pub. Util. Code § 1705.

supported by the findings, and the findings in the Decision are not supported by substantial evidence in light of the whole record.<sup>48</sup>

**A. The Commission Committed Legal Error by Refusing to Consider Project Cost and Need.**

The Project will cost an estimated \$1 billion and span nearly 150 miles.<sup>49</sup> The Commission's constitutional and statutory duties to ensure that rates are just and reasonable require it to consider cost and need for projects of this magnitude. The Commission has discretion to do this by requiring a CPCN or by incorporating evidence on project cost and need into its consideration of a PTC. Instead, the Commission used the voltage cut-off in policy statement GO 131-D as an excuse to ignore the Project's huge price tag and disregard the lack of demonstrated need for this massive undertaking. Further, the Commission summarily dismissed parties' arguments that this Project should not be exempt from such review by mischaracterizing them as an "attack" on other Commission decisions entirely unrelated to this proceeding.<sup>50</sup> To comply with its duty to ensure just and reasonable rates, the Commission must consider the cost of and need for this major, expensive Project, and the Commission committed legal error and abused its discretion when it approved the Project without doing so.

**1. The Commission Violated Its Statutory Obligations to Protect Ratepayers.**

The Commission is both authorized and obligated to protect ratepayer interests.<sup>51</sup> The California Constitution authorizes the Commission to enforce a "just and reasonable" standard for utility rates,<sup>52</sup> and statutes mandate it do so.<sup>53</sup> In supervising and regulating public utilities, the Commission "may do all things . . . which are necessary and convenient in the exercise of

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<sup>48</sup> See Pub. Util. Code § 1757(a).

<sup>49</sup> D.16-05-038 at 3-4; POC Op. Br. at 3-4, 10.

<sup>50</sup> D.16-05-038 at 12.

<sup>51</sup> *PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1208 (acknowledging the Commission's "mandate to protect the interests of ratepayers"); *Cory v. P.U.C.* (1983) 33 Cal.3d 522, 529 (J. Reynoso, dissenting) (The Commission "stands nearly alone among state agencies as a constitutionally empowered, independent, multifunctioned body whose mandate is to represent and protect the public good.").

<sup>52</sup> *Monterey Peninsula Water Mgmt. Dist. v. P.U.C.* (2016) 62 Cal.4th 693, 699-700 (the Commission's authority to enforce the just and reasonable standard "derives from the Commission's constitutional power to fix the rates of public utilities (Cal. Const., art. XII, § 6)").

<sup>53</sup> Pub. Util. Code § 454 (requiring that charges for public utility services be just and reasonable); *Monterey Peninsula Water Mgmt. Dist.*, 62 Cal.4th at 699-700.

such power and jurisdiction.”<sup>54</sup> Under section 1005.5(a), the Commission must review costs for construction projects that will exceed \$50 million.<sup>55</sup> Section 701 vests the Commission with “‘expansive’ authority . . . regardless of whether it is specifically designated in the Public Utilities Code ‘or in addition thereto.’”<sup>56</sup> The Commission may “establish its own procedures,”<sup>57</sup> and “employ unwritten procedures on a case-by-case basis provided that those procedures do not contradict a statute and are consistent with the requirements of due process.”<sup>58</sup> The Commission’s powers “are liberally construed”; the only limit is that any additional powers the Commission exercises “must be cognate and germane to the regulation of public utilities.”<sup>59</sup>

This Project is more than eight times the section 1005.5 threshold for the review.<sup>60</sup> Over a 30-year period of depreciation, this \$418 million Project may add more than \$1 billion to SDG&E’s rates.<sup>61</sup> According to an estimate by ORA, the Project could increase SDG&E customer rates by as much as 2% – for alleged service improvements to fewer than 5,000 customers.<sup>62</sup> Further, the environmental review process did not analyze the costs environmental mitigation measures may add to the Project. The undergrounding, relocation of power lines to avoid sensitive habitat, and numerous other modifications required by the Decision are likely to substantially increase the already enormous original estimated cost of the Project.<sup>63</sup> None of these issues have been properly considered by the Commission in this proceeding. The Commission has authority to consider the cost of and need for this Project, and it violated its mandates to do so here.

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<sup>54</sup> Pub. Util. Code § 701.

<sup>55</sup> Pub. Util. Code § 1005.5(a); *see also* 1996 Cal. PUC LEXIS 24, \*6-7 (applying the requirement to specify the maximum cost determined to be “reasonable and prudent” to a transmission line project).

<sup>56</sup> *Southern Cal. Edison Co. v. P.U.C.* (2014) 227 Cal.App.4th 172, 186.

<sup>57</sup> Cal. Const., art. XII, § 2.

<sup>58</sup> *San Pablo Bay Pipeline Co., LLC v. P.U.C.* (2015) 243 Cal.App.4th 295, 313.

<sup>59</sup> *Consumers Lobby Against Monopolies v. P.U.C.* (1979) 25 Cal.3d 891, 905-06 (quotation omitted).

<sup>60</sup> POC Opening Brief at 11.

<sup>61</sup> POC Op. Br. at 3-4, 10.

<sup>62</sup> ORA Protest at 4.

<sup>63</sup> POC Op. Br. at 3-4.

**2. The Commission Should Have Required a Certificate of Public Convenience and Necessity to Protect Ratepayers from the Risks Inherent in a Project of This Size and Scope.**

The Commission abused its discretion and failed to proceed in a manner required by law when it approved this Project via the PTC process instead of the CPCN process required by the Public Utilities Code and Commission policy. This procedural failure contributed to the Commission's improper decision to approve the Project without making findings of need and public convenience. Had the Commission used the CPCN process, which is intended to ensure that ratepayers do not unnecessarily shoulder the steep costs of an unneeded project, it would have reached the issues of need and cost.<sup>64</sup>

Pursuant to the Public Utilities Code, before constructing a "line, plant, or system," a utility must obtain a CPCN from the Commission confirming that "present or future convenience and necessity require or will require" the construction.<sup>65</sup> The Commission is both authorized and obligated to protect ratepayer interests<sup>66</sup>; the Constitution authorizes the Commission to enforce a "just and reasonable" standard for utility rates,<sup>67</sup> and its statutory mandates direct it to do so.<sup>68</sup> These requirements protect ratepayers from unnecessary costs.

The Commission generally only requires CPCNs for lines designed to operate above 200 kV,<sup>69</sup> but it has the discretion to require CPCNs where, as here, doing so will ensure that rates remain just and reasonable.<sup>70</sup> Further, the Commission's practice of not requiring CPCNs for transmission lines below 200 kV is justified only by application of an informal policy not codified in the Code or Commission Rules.<sup>71</sup> The Commission relies solely on GO 131-D as grounds for approving this Project without considering project need and economic costs.<sup>72</sup> GO 131-D is an informal policy statement that was not approved by the Legislature or the

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<sup>64</sup> D.94-06-014 (July 8, 1994); *see* 1994 Cal. PUC LEXIS 453, \*32 (explaining that the absence of economic risk to ratepayers justifies the exemption from CPCN review process for under-200-kV projects).

<sup>65</sup> Pub. Util. Code § 1001.

<sup>66</sup> *See PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1208 (acknowledging the Commission's "mandate to protect the interests of ratepayers"); *Cory v. P.U.C.* (1983) 33 Cal.3d 522, 529.

<sup>67</sup> *Monterey Peninsula Water Mgmt. Dist.*, 62 Cal.4th at 699-700.

<sup>68</sup> Pub. Util. Code § 451 (requiring that charges for public utility services be just and reasonable).

<sup>69</sup> GO 131-D at 2.

<sup>70</sup> Pub. Util. Code § 1001.

<sup>71</sup> *See* GO 131-D.

<sup>72</sup> D.10-05-038 at 10-13.



Commission pursuant to a rulemaking and does not, therefore, have any force of law.<sup>73</sup> While the Commission has general flexibility to implement its own rules, regulations, and policies, to vary the review procedures it uses in any given case, and to vary the factors it reviews,<sup>74</sup> it cannot do so in violation of state law or the Commission's rules. Accordingly, the Commission has deviated from its policies where it deems such deviations reasonable or necessary.<sup>75</sup> The Commission's reliance on GO 131-D to justify its violation of the Public Utilities Code and its own rules is a clear abuse of discretion and failure to act in a manner required by law.

**3. The Commission Refused to Make Findings of Fact and Conclusions of Law on Issues Material to the Decision: Need and Cost.**

Commission decisions must include "findings of fact and conclusions of law by the commission on all issues material to the order or decision."<sup>76</sup> The Commission abused its discretion and failed to proceed in the manner required by law when it refused to make such findings. Because the Decision nonetheless relies upon allegations of need and cost savings, its conclusions are not supported by the findings and the findings are not supported by substantial evidence.

In the Decision, the Commission claims that POC's argument that "the Commission nevertheless has a duty to consider project need and cost pursuant to Section 451 and 1005.5(a) . . . amounts to an improper collateral attack on the many Commission decision approving the exemption of project with operating voltages at or below 200kV from such review."<sup>77</sup> First, whether or not the Commission complied with its statutory mandate for unrelated past projects is immaterial to the question of whether or not the Commission complied with its duty in this case, given the specific set of facts and circumstances of the Project. In the Decision, the Commission implicitly defines the limits of GO 131-D when it states, "GO 131-D specifies a more limited

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<sup>73</sup> See *Christensen v. Harris City* (2000) 529 U.S. 576, 587 (interpretations contained in policy statements, agency manuals, enforcement guidelines do not warrant deference).

<sup>74</sup> See, e.g., Cal. Const., art. XII, § 2; Pub. Util. Code §§ 701, 1001.5(a) (Commission may determine out-of-state utility projects require CPCN when required by the public interest); 1998 Cal. PUC LEXIS 756, \*10-11 ("All requirements, including the Rules, should be liberally construed, and . . . deviations are permissible for just cause.").

<sup>75</sup> See 1995 Cal. PUC LEXIS 848, \*154-56.

<sup>76</sup> Pub. Util. Code § 1705; *California Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59.

<sup>77</sup> D.16-05-038 at 12.

review for projects which are designed for operation at voltage between 50kV and 200kV.”<sup>78</sup> Because it has no force of law, GO 131-D operates only as a vehicle for the Commission to specify its preference for limiting review for certain classes of projects; the Commission is not required, statutorily mandated, or under any obligation or duty to *not* consider need or cost for all transmission lines below 200 kV. Rather, the Commission is, in fact, required, mandated, and under a duty to conduct such review for this Project.

Second, the Commission has previously exercised its authority and flexibility to require utilities to obtain a CPCN rather than a PTC. For example, in 2009, SCE sought a PTC for its Alberhill System Project, based on project components that would operate between 50 and 200 kV.<sup>79</sup> The Commission required a CPCN instead, because some portions of the project would likely “pose economic risk to ratepayers.”<sup>80</sup> While GO 131-D outlines the Commission’s general policy as to whether a project would normally require a CPCN or a PTC, the Commission must only adhere to it where appropriate in light of the Commission’s broader mandates.

Finally, the Commission has acted outside the limits of its own self-imposed restrictions on what level of review certain transmission lines will undergo. D.94-06-014, which implemented GO 131-D, emphasized that PTCs are appropriate for small-scale projects that “pose little economic risk to ratepayers.”<sup>81</sup> The PTC process is meant to address the “large number of power lines and substations . . . built or upgraded each year” that:

- must be “completed in a short time,”
- “involve relatively compact parcels of land,” and
- “do not present unique engineering or construction problems.”<sup>82</sup>

None of those conditions are present here.<sup>83</sup>

The projects the Commission normally reviews through the PTC process are far smaller and cheaper than this Project. For example, typical wood-to-steel pole replacement projects that

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<sup>78</sup> D.16-05-038 at 12.

<sup>79</sup> A.09-09-022, Assigned Commissioner’s Ruling Directing Caption Modification (Mar. 3, 2010) at 2.

<sup>80</sup> A.09-09-022, Assigned Commissioner’s Ruling Directing Caption Modification (Mar. 3, 2010) at 2-3.

<sup>81</sup> 1994 Cal. PUC LEXIS 453, \*32.

<sup>82</sup> 1994 Cal. PUC LEXIS 453, \*32.

<sup>83</sup> See POC. Op. Br. at 8-9.

receive PTCs run 7 to 14 miles and cost \$11.9 million to \$50 million.<sup>84</sup> Other PTC projects typically affect 0.8 to 12 miles of line.<sup>85</sup> The cost of PTC projects does not tend to exceed \$50 to \$60 million.<sup>86</sup> In contrast, CPCN projects tend to be both large and expensive, and the CPCN review process is designed to protect ratepayers from unnecessary expenses. Typical CPCNs projects run up to 200 miles and cost \$119 million to \$1.16 billion.<sup>87</sup> The Commission monitors costs of construction projects that exceed \$50 million and sets cost caps for such projects,<sup>88</sup> and the lack of such a protective cap for PTC projects indicates that such projects are not expected to be large or expensive enough to pose such a significant financial threat.

The Project falls squarely within the size and cost range for projects that require CPCNs, and it poses a commensurate risk to ratepayers. Further, it is more than ten times larger in scope and cost than a typical PTC project. The Commission's arguments as to why it need not make findings of fact or conclusions of law regarding need and cost are without merit. Thus, the Commission should have required a CPCN for the Project and considered cost and need, and its failure to do so is legal error and an abuse of discretion.

#### **4. The Commission Should Have Used Its Authority and Flexibility to Protect Ratepayers from Economic Risk in the PTC Proceeding.**

Even if the Commission's use of a PTC in this instance were correct, the Commission erred in not considering the cost of and need for the Project before granting the PTC. The Commission is statutorily required to protect ratepayer interests and to assure that rates are just

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<sup>84</sup> See, e.g., A.15-08-006 (Aug. 10, 2015) at 2, Appendix H (tie-line project 649 replaced 7 miles of wood poles with steel for \$11.9 million to \$14.5 million); A.13-03-003 (Mar. 13, 2013) at 3, Appendix I (tie-line project 637 replaced 14 miles of poles for \$30 to \$50 million).

<sup>85</sup> See, e.g., A.12-11-007, Proposed Decision (Feb. 21, 2014) at 3, 11 (SCE Sunshine Canyon Landfill subtransmission line relocation project removed 0.8 miles of line for \$3.9 million); A.12-12-007 (Dec. 13, 2012) at 1, Appendix I (SDG&E tie-line 6931 fire hardening and wind interconnection project affects 5.2 miles of existing line for \$34 million +/- 10%).

<sup>86</sup> See, e.g., A.10-12-017 (Dec. 29, 2010) at 3 (\$58.5 million).

<sup>87</sup> See, e.g., 1996 Cal. PUC LEXIS 24, 29, 32 (Sierra Pacific Power Co. project stretches from Alturas, California to Nevada and costs \$119 million); 2014 Cal. PUC LEXIS 64 (SCE Devers Colorado River transmission line project costs \$840 million); D.09-12-044 (Dec. 17, 2009) at 27, 97 (SCE Tehachapi Renewable Transmission Project affects 173 miles and costs \$1.7 billion).

<sup>88</sup> Pub. Util. Code § 1005.5; see, e.g., 1998 Cal. PUC LEXIS 305 at 1, 15 (increasing the cost cap for a transmission line project after the company demonstrated a need for additional funding); 2014 Cal. PUC LEXIS 64, 62 ("Public Utilities Code § 1005.5(b)[] allows the CPUC to revise a cost cap in a CPCN proceeding.").

and reasonable.<sup>89</sup> Considering the cost of and need for large, expensive projects serves to ensure that such projects do not result in unjust expense to ratepayers. In particular, the Commission must ensure that all rates demanded or received by a public utility are just and reasonable: “a public utility shall not change any rate . . . except upon a showing before the commission, and a finding by the commission that the new rate is justified.”<sup>90</sup> The Commission failed to comply with its statutory mandate to consider cost and need.

Further, given the high probability that the Project costs are not recoverable under FERC’s jurisdiction, the Commission should have ordered SDG&E to show impact of the Project on ratepayers in accordance with Rule 3.1(h).<sup>91</sup> When a utility proposes new construction or an extension, Rule 3.1(h) requires the utility to state “the proposed rates to be charged for service to be rendered by means of such construction or extension.”<sup>92</sup> If the application proposes any increase in rates, it must include a detailed description of the proposed changes.<sup>93</sup> By allowing SDG&E to avoid this reporting requirement, the Commission compounded the lack of information made available about the cost of, and need for, this Project.

#### **B. The Decision Violates CEQA and GO 131-D.**

The Commission’s CEQA findings and conclusions contain numerous factual and legal errors that warrant rehearing. The Commission determined that the EIR was completed in compliance with CEQA, even though the Commission: failed to consider a reasonable range of alternatives; improperly narrowed the Project objectives over half a year after the opportunity for public comment had passed; failed to properly consider the Project’s growth-inducing and cumulative impacts; and failed to properly respond to public comments.<sup>94</sup> Further, the Commission’s conclusion that the benefits of the Project present overriding considerations is not supported by substantial evidence in the record.<sup>95</sup> The Commission must not grant a PTC unless

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<sup>89</sup> Pub. Util. Code § 451; *Monterey Peninsula Water Mgmt. Dist.*, 62 Cal.4th at 699-700.

<sup>90</sup> Pub. Util. Code § 454.

<sup>91</sup> ORA Protest at 4.

<sup>92</sup> Rule 3.1(h).

<sup>93</sup> Rule 3.2(a).

<sup>94</sup> See D.16-05-038 at 22, 27, 37.

<sup>95</sup> See D.16-05-038 at 37.

the Commission has complied with CEQA.<sup>96</sup> Thus, the Commission's decision to issue a PTC based on its erroneous CEQA analysis is reversible error.<sup>97</sup>

**1. The Commission Failed to Analyze a Reasonable Range of Project Alternatives.**

The EIR improperly rejected numerous feasible alternatives that could have reduced the Project's significant impacts. An EIR must analyze a range of alternatives that provides enough variation from the proposed project "to allow informed decisionmaking."<sup>98</sup> Here, the EIR should have fully analyzed vegetation management, no-wire, distributed generation, undergrounding, and pole design alternatives that would have reduced the Project's significant impacts.<sup>99</sup> Instead, the Commission improperly relied on narrow interpretations of its Project objectives to reject all these alternatives.

**a. The Commission Improperly Applied Project Objectives to Exclude Feasible Project Alternatives.**

The Decision states the EIR considered and rejected numerous alternatives because "they failed to meet most of the project objectives."<sup>100</sup> An alternative's inability to meet all project objectives is not a valid basis for its rejection, because "[i]t is virtually a given that the alternatives to a project will not attain *all* of the project's objectives."<sup>101</sup> The EIR identifies only two objectives: "Reduce fire risk by fire hardening electric facilities in and around the CNF" and "Improve the reliability of power delivery to surrounding communities."<sup>102</sup> It rejects several

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<sup>96</sup> See Pub. Resources Code § 21000 et seq.; GO 131-D § B.

<sup>97</sup> See D.16-05-038 at 5; Pub. Util. Code § 1757(a).

<sup>98</sup> See *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 404-05; Pub. Resources Code § 21100(b)(4); 14 Cal. Code Regs. ("CEQA Guidelines") § 15126.6(a), (c); see also *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089 (The "purpose of an environmental impact report is to identify the significant effects of a project on the environment, *to identify alternatives to the project*, and to indicate the manner in which those significant effects can be mitigated or avoided.) (citations omitted) (emphasis in original).

<sup>99</sup> See Opening Brief of CNFF and Backcountry (Nov. 2, 2015) at 32-43.

<sup>100</sup> D.16-05-038 at 14.

<sup>101</sup> *Watsonville Pilots Assn.*, 183 Cal.App.4th at 1087, 1090 (emphasis in original) (invalidating EIR that failed to analyze a reduced development alternative); see also *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354 ("A potential alternative should not be excluded from consideration merely because it 'would impede to some degree the attainment of the project objectives, or would be more costly.'") (quoting CEQA Guidelines § 15126.6(b)).

<sup>102</sup> EIR at A-10.

viable alternatives for purportedly failing to meet one of these objectives.<sup>103</sup> Since the Commission must not reject alternatives for failing to meet all (both) of the Project objectives, its rejection of these alternatives was legal error.

**b. The Commission Was Required to Analyze an Alternative that Would Reduce the Project's Primary Impact: Significant Harm to Air Quality.**

The Decision misstates the CEQA rules for the range of alternatives an EIR must consider. It claims that “CEQA establishes no categorical legal imperative as to the scope of alternatives analyzed in an EIR,” and that “CEQA does not require an EIR to develop an alternative to mitigate each and every impact.”<sup>104</sup> While the Commission is correct that it need not necessarily mitigate every impact (for example, if such mitigation is not feasible), courts have repeatedly invalidated EIRs where, as here, they fail to analyze alternatives that could reduce a project's primary, significant impacts.<sup>105</sup>

The Project, as approved, will have significant adverse impacts on air quality. One-to-one replacement of over 2,100 poles requires major construction that will generate “dust and exhaust emissions of criteria pollutants and toxic air contaminants.”<sup>106</sup> SDG&E anticipates that the Project will take 5 years to complete,<sup>107</sup> with construction up to 12 hours per day and 6 days per week.<sup>108</sup> About a quarter of the pole replacements will require helicopters, with up to 64 flights per day across the Project area.<sup>109</sup> During peak construction, up to 38 crews may be working at

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<sup>103</sup> See, e.g., EIR at C-20 (rejecting System Alternative 4: Management and System Maintenance Oversight because it would not include “the superior strength and fire resistance of steel poles”), C-18 to C-20 (rejecting System Alternatives 3 (No-Wire) and 5 (Distributed Generation) because they would not meet the Project objective of service reliability).

<sup>104</sup> D.16-05-038 at 29-30.

<sup>105</sup> See *Watsonville Pilots*, 183 Cal.App.4th at 1089-90 (FEIR deficient for failing to include reduced development alternative that would avoid or lessen the project's primary growth-related significant impacts); *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1285, 1305 (invalidating FEIR that failed to discuss any feasible alternative that would lessen the project's primary water supply impact); Pub. Resources Code § 21002.

<sup>106</sup> EIR at D.3-17. Although the Commission's decision does not describe the expected impacts of the approved project in any detail, the air quality impacts will remain significant. D.16-05-038 at 37.

<sup>107</sup> EIR at B-37, B-59.

<sup>108</sup> EIR at B-37 to B-38.

<sup>109</sup> EIR at B-4 (2,102 pole replacements), B-45 (helicopters at approximately 514 pole locations), B-51.

one time, resulting in 304 to 532 trips per day.<sup>110</sup> The intensity of the adverse air quality impacts associated with construction will increase during these peak periods.<sup>111</sup> The C440 undergrounding the Commission approved will increase these significant air quality impacts.<sup>112</sup> The environmentally superior alternative reduces construction by approximately five miles, but will still cause Class I significant and unavoidable VOC, NO<sub>x</sub>, CO, and PM<sub>2.5</sub> emissions, and therefore affect public health.<sup>113</sup>

Although parties identified numerous potential alternatives that could reduce the Project's significant air quality impacts, the EIR fails to analyze any alternative that substantially reduces or avoids these impacts. The two alternatives fully analyzed in the EIR (Partial Removal of Overland Access Roads and Removal of TL626) both involve steel pole construction, and thus both would result in similar significant and unavoidable construction impacts related to air quality.<sup>114</sup> Thus, the EIR fails to comply with CEQA.<sup>115</sup>

**c. The Commission Failed to Support Its Rejection of Alternatives.**

CEQA requires agencies to explain their rejection of potentially feasible alternatives in a manner "sufficient to enable meaningful public participation and criticism."<sup>116</sup> Here, the Commission summarily dismissed numerous alternatives without adequate justification.

**i. The Commission Rejected Alternatives Based on an Improperly Narrow Definition of Fire Hardening.**

Courts have repeatedly found that agencies violate CEQA when they reject alternatives based on unsupported conclusions.<sup>117</sup> Here, the Commission appears to have rejected alternatives

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<sup>110</sup> EIR at B-51.

<sup>111</sup> *See, e.g.*, EIR at B-51 (describing increases in trips during peak construction).

<sup>112</sup> D.16-05-038 at 17.

<sup>113</sup> D.16-05-038 at 36; EIR at ES-18 to ES-19, E-36, D.3-3, D.3-32.

<sup>114</sup> EIR at ES-9 to ES-10, E-25.

<sup>115</sup> *Habitat and Watershed Caretakers*, 213 Cal.App.4th at 1305. The EIR's failing in this regard is all the more troubling in light of the Project's \$1 billion price tag. The construction impacts not only have the greatest un-mitigated environmental cost, they have an enormous economic cost.

<sup>116</sup> *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1458.

<sup>117</sup> *Save Round Valley Alliance*, 157 Cal.App.4th at 1465; *Habitat and Watershed Caretakers*, 213 Cal.App.4th at 1305 ("CEQA does not permit a lead agency to omit . . . analysis . . . of any alternatives that feasibly might reduce the environmental impact of a project on the *unanalyzed theory* that such an alternative *might not* prove to be environmentally superior to the project")

based on an improperly narrow construction of the term “fire hardening.” An SDG&E representative described fire hardening as “a combination of things” that “mak[e] the system more robust,”<sup>118</sup> and the Decision appears to define fire hardening as “increasing fire safety.”<sup>119</sup> However, even though nothing in the record indicates that fire hardening must involve steel poles, the EIR and Decision use the term “fire hardening” as synonymous with wood-to-steel pole conversion.<sup>120</sup> The EIR lists 17 alternatives to the Project, but the only two it carries forward for full analysis (other than the required “No Project” alternative) rely primarily on steel pole construction for fire hardening.<sup>121</sup> It notes, for example, that undergrounding alternatives were rejected because they would not reduce effects relative to “replacing existing wooden poles as proposed.”<sup>122</sup> The Commission’s rejection of alternatives to pole conversion, based on its unsupported conclusion that fire hardening must include steel poles, violates CEQA.

**ii. The Commission Did Not Explore the Reliability of Alternative Power Delivery Methods.**

The Commission’s application of its reliability objective to the No-Wire and Distributed Generation alternatives is also unsupported by the record. Parties to this proceeding submitted extensive comments regarding the feasibility of these alternatives, but their comments were brushed aside. POC, for example, gave five examples of successful local/regional microgrid projects that provide sufficiently reliable service, including SDG&E’s Borrego Springs Microgrid project.<sup>123</sup> These examples demonstrate that the No-Wire and Distributed Generation alternatives may be feasible, but the EIR provides no meaningful response to these comments. Instead, it simply states that the alternatives were eliminated because the existing system “is

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(emphasis in original); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884-85 (overturning FEIR in which an agency rejected an alternative based on unsupported, conclusory statements); *Preservation Action Council*, 141 Cal.App.4th at 1355 (rejecting FEIR’s alternatives analysis because “the public and the City Council were not properly informed of the requisite facts that would permit them to evaluate the feasibility of this alternative”).

<sup>118</sup> Transcript at 41:11-13 (SDG&E, Mortier).

<sup>119</sup> D.16-05-038 at 4.

<sup>120</sup> See, e.g., D.16-05-038 at 4 (“Fire hardening largely consists of replacing existing wood poles with weathered-steel poles, typically on a one-to-one ratio.”); EIR at ES-1 (“Replacement would primarily include *fire hardening (wood-to-steel pole replacement)*, relocation, and undergrounding.”) (emphasis added).

<sup>121</sup> EIR at C-3 to C-5.

<sup>122</sup> EIR at C-13 to C-14.

<sup>123</sup> EIR, Vol. II: Response to Comment Letters (June 2015) (“Response to Comments”) at D6-9.



considered the backbone of SDG&E's electrical grid system in central and eastern San Diego County.”<sup>124</sup> This explanation is insufficient.<sup>125</sup>

**iii. The Commission Did Not Support Its Rejection of Undergrounding Alternatives.**

CEQA does not allow the lead agency to omit discussion or analysis of an alternative that might reduce the environmental impact of a project “on the *unanalyzed theory* that such an alternative *might not* prove to be environmentally superior to the project.”<sup>126</sup> The EIR directly violates this rule by dismissing undergrounding alternatives because they “would not substantially avoid or reduce environmental effects resulting from replacing existing wooden poles as proposed,” and “may not meet the screening criteria for feasibility due to potential construction challenges.”<sup>127</sup>

Undergrounding the Project's 149 miles of electrical lines would reduce many of the Project's environmental impacts.<sup>128</sup> As the EIR acknowledges, undergrounding would “reduce long-term impacts due to fire hazards and visual impacts,” as well as “vegetation management impacts.”<sup>129</sup> Furthermore, the EIR confirms that the complete undergrounding alternative “would likely meet the reliability needs for existing energy users, and therefore screening criteria for project objectives and purposes and need.”<sup>130</sup> The Forest Service determined that the review process should include evaluation of more undergrounding, in addition to other fire risk reduction measures.<sup>131</sup>

Nonetheless, the EIR rejects the full undergrounding alternative<sup>132</sup> and does not consider POC's proposed undergrounding near recreation areas alternative.<sup>133</sup> The EIR asserts that the complete undergrounding alternative “would result in a significant increase in permanent disturbance/impact to sensitive resources over that caused by the proposed wood-to-steel pole

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<sup>124</sup> Response to Comments at D6-40.

<sup>125</sup> See *Save Round Valley*, 157 Cal.App.4th at 1458.

<sup>126</sup> *Habitat and Watershed Caretakers*, 213 Cal.App.4th at 1305 (emphasis in original).

<sup>127</sup> EIR at C-13 to C-14.

<sup>128</sup> See Response to Comments D6-2 to D6-8 (proposing full undergrounding alternative), D6-12 to D6-13 (proposing undergrounding near recreational areas alternative).

<sup>129</sup> EIR at ES-14, ES-19 (confirming that “placing power lines underground” would “improve scenic quality” and “reduce fire risk associated with overhead power lines”).

<sup>130</sup> EIR at C-13.

<sup>131</sup> See D.16-05-038 at 3.

<sup>132</sup> EIR at C-14.

<sup>133</sup> Response to Comments at D6-12 to D6-13.

replacement,”<sup>134</sup> but fails to identify the “sensitive resources” that the alternative would purportedly harm.<sup>135</sup> The EIR also claims the alternative would increase the “permanent footprint” of the Project and “may not meet the screening criteria for feasibility due to potential construction challenges,” but provides no details.<sup>136</sup> Further, the Decision approves some undergrounding,<sup>137</sup> but fails to reconcile this with the EIR’s rejection of other undergrounding alternatives.

CEQA requires more. The EIR may not just leave it to the reader to divine why undergrounding alternatives might not be feasible. Rather, CEQA mandates that an agency’s rejection of an alternative as “infeasible” or otherwise “unworthy of more in-depth consideration” must be supported by “substantial evidence” and explanation.<sup>138</sup>

**iv. The Commission Failed to Consider a Pole Design Alternative that Would Have Reduced the Project’s Visual Impacts.**

The Commission also improperly rejected POC’s proposed pole design alternative.<sup>139</sup> Even if wood-to-steel pole conversion were necessary for fire hardening, taller poles and increased capacity are not. As POC noted in its comments on the Draft EIR, the Commission should have analyzed a steel poles alternative that closely matched pole height and diameter to existing wooden poles.<sup>140</sup> Such an alternative would have reduced the Project’s significant visual impacts on the CNF, BLM lands, tribal lands, and surrounding communities.<sup>141</sup> The Commission did not adequately respond to this comment in the EIR,<sup>142</sup> and the record does not include substantial evidence that supports the Commission’s decision to approve taller poles with increased capacity.

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<sup>134</sup> EIR at C-14.

<sup>135</sup> EIR at C-14.

<sup>136</sup> EIR at C-14.

<sup>137</sup> D.16-05-038 at 38.

<sup>138</sup> *Center for Biological Diversity*, 185 Cal.App.4th at 885.

<sup>139</sup> See Response to Comments at D6-10 to D6-12.

<sup>140</sup> Response to Comments at D6-10.

<sup>141</sup> Response to Comments at D6-10.

<sup>142</sup> Response to Comments at D6-41.

## **2. The Commission's Shifting Project Objectives and Unduly Narrow Purpose Violate CEQA.**

Rather than addressing parties' valid concerns about alternatives, the Commission attempted to dodge them by significantly changing the Project purpose. On January 6, 2016, more than half a year after the Commission circulated the Final EIR and more than a month and a half after parties filed their reply briefs, the Commission issued Errata #2.<sup>143</sup> The Decision states that Errata #2 clarifies that "the purpose of the proposed project is to reduce the risk of wildfire due to powerline failure, not to build a powerline that is resistant to wildfires."<sup>144</sup> This change violates CEQA.<sup>145</sup>

As the EIR acknowledges, "CEQA Guidelines (Section 15124[b]) requires that an EIR provide a statement of objectives sought by the proposed project that will assist the lead agency in developing a reasonable range of alternatives. In addition, CEQA Guidelines (Section 15126.6) requires that project objectives be set forth in an EIR to help define alternatives to the proposed project that meet most of the basic project objectives."<sup>146</sup>

As noted above, the EIR identifies two Commission Project objectives: "Reduce fire risk by fire hardening electric facilities in and around the CNF" and "Improve the reliability of power delivery to surrounding communities."<sup>147</sup> "Fire hardening" was not defined in the EIR, and SDG&E's expert described fire hardening as "a combination of things" that "mak[e] the system more robust."<sup>148</sup> The EIR did not identify a Commission purpose for the Project, but it did identify a "Forest Service Purpose and Need": "to reduce fire risk associated with the existing facilities in a high fire hazard area through fire hardening of facilities in the CNF."<sup>149</sup>

The narrower purpose stated in Errata #2 is a major change. The range of alternatives that could achieve general fire hardening may have been much broader than the range of alternatives

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<sup>143</sup> EIR, Errata #2 (Jan. 6, 2016) ("Errata #2") at 1.

<sup>144</sup> D.16-05-038 at 29.

<sup>145</sup> *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 198 ("A curtailed, enigmatic or unstable project description draws a red herring across the path of public input.").

<sup>146</sup> EIR at A-10.

<sup>147</sup> EIR at A-10.

<sup>148</sup> Transcript at 41:11-13 (SDG&E, Mortier).

<sup>149</sup> EIR at A-8 to A-9. Errata #2 states that it clarifies the Section A.4 Purpose and Need described on pages A-8 to A-10 of the EIR. Errata #2 at 1. This section identifies Purposes and Needs for the Forest Service, BLM, and BIA, but not for the Commission. EIR at A-8 to A-10.

that would “reduce the risk of wildfire due to powerline failure.”<sup>150</sup> Further, a consistent project description is critical to the public participation process. “[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR’s bona fide subject.”<sup>151</sup> Accordingly, the Commission’s use of mercurial project objectives violates CEQA.<sup>152</sup>

Further, Errata #2 gives the project purpose an “artificially narrow definition” designed to preclude consideration of other fire risk reduction strategies in the Cleveland National Forest.<sup>153</sup> A recent case found that when the lead agency’s overly narrow project purpose caused it to “dismiss[] out of hand” a relevant alternative, this error “infected the entire EIR.”<sup>154</sup> Here, the Commission did just that. Whether the Commission originally misstated its objectives or narrowed them after public comment, it used the new, impermissibly narrow purpose to brush off, rather than address, the Parties’ comments.<sup>155</sup>

Such a change in the EIR warrants recirculation. If the lead agency adds significant new information to an EIR after the period of public and interagency review, the agency must recirculate the revised EIR.<sup>156</sup> “The revised environmental document must be subjected to the same critical evaluation that occurs in the draft stage, so that the public is not denied an opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.”<sup>157</sup>

Finally, although the Decision identifies the Project objectives and purpose described above, the Decision ultimately appears to have little to do with any of these stated goals. Instead,

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<sup>150</sup> Errata #2 at 1.

<sup>151</sup> *County of Inyo*, 71 Cal.App.3d at 199.

<sup>152</sup> *See County of Inyo*, 71 Cal.App.3d at 200.

<sup>153</sup> *See In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1166.

<sup>154</sup> *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669-70.

<sup>155</sup> *See, e.g., D.16-05-038* at 29 (“Errata #2 . . . clarifies the EIR/EIS’s response to Backcountry’s comment. . . . Thus, the comment asserting that the proposed project is susceptible to failure in the event of wildfire does not inform the question of whether the proposed project will achieve its purpose.”).

<sup>156</sup> *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 131 (finding a late-issued errata “warranted further discussion and analysis and an opportunity for public response”); *see* Pub. Resources Code § 21092.1; CEQA Guidelines § 15088.5(a).

<sup>157</sup> *Save Our Peninsula Com.*, 87 Cal.App.4th at 131 ; *see* Pub. Resources Code § 21092.1; CEQA Guidelines § 15088.5(a).

the Decision made a sudden pivot toward another of SDG&E's objectives: "obtaining the Commission approvals the Forest Service will require before issuing a [Master Special Use Permit ("MSUP")]."<sup>158</sup> This is not identified as a Commission objective for the Project.<sup>159</sup> Nonetheless, the ALJ did not issue her Proposed Decision until after the Forest Service,<sup>160</sup> and the Decision changed the Project to include undergrounding of TL 682 and C440, "pursuant to the federal preferred alternative."<sup>161</sup> SDG&E's ability to obtain an MSUP falls outside the scope of issues the Commission defined as governing this proceeding,<sup>162</sup> and the Commission's reliance on the Forest Service decision indicates that the Commission did not actually exercise its "independent authority" in approving the Project.<sup>163</sup>

### **3. The Commission Failed to Analyze the Project's Growth-Inducing Effects.**

A proposed project is either directly or indirectly growth-inducing if it removes obstacles to growth or encourages or facilitates other activities that cause significant environmental effects.<sup>164</sup> The EIR did not adequately analyze the growth-inducing effects of the Project's replacement of existing conductors on all five 69 kV lines and single- to double-circuit conversion on two of the 69 kV lines.<sup>165</sup> These updates will result in a fourfold increase in the conductor's ability to move energy.<sup>166</sup> The EIR acknowledges the Project will "increase capacity to move electricity, thereby removing a possible obstacle to growth of new local renewable generation projects."<sup>167</sup> However, it claims the Project's growth-inducing impacts are too "speculative" to warrant analysis.<sup>168</sup> As POC previously commented, the increased capacity to move electricity will greatly reduce or even eliminate the possibility that a CAISO study would

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<sup>158</sup> See D.16-05-038 at 4, 9, 38.

<sup>159</sup> See EIR at A-10.

<sup>160</sup> D.16-05-038 at 9.

<sup>161</sup> D.16-05-038 at 38.

<sup>162</sup> See EIR at A-10.

<sup>163</sup> The Decision indicates that the Commission delayed its proposed decision until after the Forest Service issued its decision on the Master Special Use Permit. D.16-05-038 at 9. However, in response to the parties' comments on this issue, the Commission simply stated that the parties' assertion "mischaracterizes" the proposed decision. D.16-05-038 at 34.

<sup>164</sup> CEQA Guidelines § 15126.2(d).

<sup>165</sup> ORA Protest at 2.

<sup>166</sup> EIR at G-3.

<sup>167</sup> EIR at G-3 to G-4.

<sup>168</sup> EIR at G-3 to G-4; Response to Comments at C2-12.

stop development of local renewable energy projects.<sup>169</sup> Because the Project will likely enable new energy projects, the Commission erred in limiting its analysis of the Project's growth-inducing effects.

#### **4. The Commission's Analysis of Cumulative Impacts Is Unclear.**

Lead agencies must provide a reasonable explanation for the temporal and geographic limitations used for the cumulative impacts analysis.<sup>170</sup> The temporal and geographic scales of the EIR's cumulative impacts analysis are not clearly defined and justified,<sup>171</sup> and the Commission did not clarify these scales in response to POC's comments.<sup>172</sup> Instead, the Commission's circular response simply stated that "the geographic extent for the analysis of cumulative impacts associated with the project includes the vicinity of all reasonably foreseeable cumulative projects."<sup>173</sup> This is insufficient.

#### **5. Inadequate Responses to Comments**

The Commission is required to respond to public comments.<sup>174</sup> Where commenters raise major environmental issues, the Commission must address those comments "in detail giving reasons why specific comments and suggestions were not accepted."<sup>175</sup> The response must include "good faith, reasoned analysis," and "[c]onclusory statements unsupported by factual information will not suffice."<sup>176</sup>

Here, however, the Commission offered only conclusory responses to numerous issues raised by POC and other parties in comments. Similarly, the Decision brushes off POC, CNFF, and Backcountry's comment that Errata #2 introduced a new, narrow Project purpose ("to reduce the risk of wildfire due to powerline failure, not to build a powerline that is resistant to wildfires").<sup>177</sup> Rather than acknowledging and justifying the new Project purpose, the Decision claims that Errata #2 simply "repeats" "reduction of fire risk as a basic project objective."<sup>178</sup> As

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<sup>169</sup> Response to Comments at D6-11 to D6-12.

<sup>170</sup> CEQA Guidelines §§ 15130(b)(3), 15355(b).

<sup>171</sup> See EIR at F-1; Response to Comments at D6-19.

<sup>172</sup> See Response to Comments at D6-19, D6-46.

<sup>173</sup> Response to Comments at D6-46.

<sup>174</sup> CEQA Guidelines § 15088.

<sup>175</sup> CEQA Guidelines § 15088(c).

<sup>176</sup> CEQA Guidelines § 15088(c).

<sup>177</sup> D.16-05-038 at 29.

<sup>178</sup> D.16-05-038 at 34.

noted above, this is empirically untrue.<sup>179</sup> Indeed, the Commission relied on this new purpose in the Decision, when it explained why it did not respond to comments.<sup>180</sup> Not only are these statements inconsistent, neither is an adequate response to comments.

## **6. The Commission Failed to Make the Required Findings for Each Significant Impact.**

The Commission has a duty to mitigate or avoid the Project's significant impacts to visual resources, air quality, water resources, and land use.<sup>181</sup> CEQA requires the Commission to make one or more of the following findings for each of these significant impacts:

- (1) Changes or alterations are required in, or incorporated into, the Project to mitigate or avoid the significant effect;
- (2) Changes or alterations are within the responsibility and jurisdiction of another agency and have been, or can and should be, adopted by that agency;
- (3) Specific economic, legal, social, technological, or other considerations make mitigation measures or alternatives in the EIR infeasible.<sup>182</sup>

Each of these findings must be supported by substantial evidence.<sup>183</sup> The purpose of the findings is "to record the grounds upon which [the Commission's] . . . decision rests, thus to render its legality reasonably, and conveniently, reviewable on appeal."<sup>184</sup> The findings must "bridge the analytic gap between the raw evidence and ultimate decision,"<sup>185</sup> so the Commission must include an explanation of the rationale for each finding.<sup>186</sup> Here, not only did the Commission fail to explain its findings related to significant impacts, the Decision does not even include a

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<sup>179</sup> See Errata #2 at 1 ("the purpose of the proposed project is to reduce the risk of wildfire due to powerline failure, not to build a powerline that is resistant to wildfires").

<sup>180</sup> See D.16-05-038 at 29 (Errata #2 clarified that "the purpose of the proposed project is to reduce the risk of wildfire due to powerline failure, not to build a powerline that is resistant to wildfires. Thus, the comment asserting that the proposed project is susceptible to failure in the event to wildfire does not inform the question of whether the proposed project will achieve its purpose.").

<sup>181</sup> Pub. Resources Code §§ 21002, 21002.1(b); see D.16-05-038 at 35; EIR at ES-21 to ES-34, E-6.

<sup>182</sup> Pub. Resources Code § 21081(a).

<sup>183</sup> *Larson*, 28 Cal.App.4th at 273.

<sup>184</sup> *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76, 90.

<sup>185</sup> *Natural Resources Defense Council*, 57 Cal.App.3d at 89 (quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515).

<sup>186</sup> CEQA Guidelines § 15091(a).

finding for every significant impact.<sup>187</sup> This is not enough information to demonstrate that the Commission carried out its duty to mitigate the Project's significant impacts.<sup>188</sup>

**7. The Commission's Statement of Overriding Considerations Does Not Comply with CEQA.**

The Commission must not approve the Project with any unmitigated significant impacts unless it finds that specific overriding benefits outweigh the Project's environmental impacts.<sup>189</sup> Further, the statement of overriding consideration must describe "the balance [the Commission] struck"<sup>190</sup> and the "relative magnitude of the impacts and benefits" it considered.<sup>191</sup>

The Commission's cursory statement that the "safety, reliability, economic, and environmental benefits of the proposed project . . . present overriding considerations" does not suffice.<sup>192</sup> The Commission did not make sufficient findings to support this statement and the findings of fact it did make are not based on substantial evidence. Thus, the Commission's conclusion that the benefits of the Project outweigh its significant impacts is legal error.

**a. The Commission's Finding that the Project Will Provide Safety and Reliability Benefits Is Not Supported by Substantial Evidence.**

The Commission's statement of overriding considerations must be based on substantial evidence.<sup>193</sup> This may include "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" in the EIR or elsewhere in the record.<sup>194</sup> In contrast, "argument, speculation, unsubstantiated opinion or narrative, [and] evidence that is clearly inaccurate or

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<sup>187</sup> See D.16-05-038 at 36-37 (omitting findings on the Decision's impact on water resources).

<sup>188</sup> Pub. Resources Code §§ 21002, 21002.1(b).

<sup>189</sup> Pub. Resources Code § 21081.

<sup>190</sup> *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 357 (internal quotation omitted).

<sup>191</sup> *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 693, 718.

<sup>192</sup> See D.16-05-038 at 37.

<sup>193</sup> CEQA Guidelines § 15093(b); see, e.g., *Woodward*, 150 Cal.App.4th at 719 (claim of superior economic benefits in statement of overriding considerations was not supported by substantial evidence in the record); *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223-24 (statement of overriding considerations found "substantively infirm" because assertions in the Statement lacked evidentiary support in the record), disapproved on other grounds by *Voices of the Wetlands v. State Water Resources Bd.* (2011) 52 Cal. 4th 499, 529.

<sup>194</sup> CEQA Guidelines § 15384.



erroneous” do not aid the Commission in meeting this burden.<sup>195</sup> An “unsupported claim that the project will confer general benefits” falls far short of this bar.<sup>196</sup>

The Decision states the Project will “provide the safety and reliability benefits of reducing the risk of power line failure and thereby reducing [sic] the risk of wildfires in and around the Cleveland National Forest and power outages caused by power line failure by replacing wood poles with steel poles.”<sup>197</sup> However, as POC and ORA noted in their original protests, SDG&E’s Application does not describe fire safety or reliability problems that create a need for the Project.<sup>198</sup> POC and ORA originally urged the Commission to require a public hearing in this proceeding, because SDG&E would have to prove that reliability problems actually exist, that no cost-effective alternatives to the Project are available, and that the benefits of the Project to ratepayers are commensurate with its costs.<sup>199</sup> However, SDG&E never explained why it needs to implement measures beyond state and federal fire requirements to address any purported safety or reliability problems.<sup>200</sup> The EIR, testimony, and Decision all fail to address this fundamental issue.

Indeed, the steel pole construction component of the Project was introduced in response to public comments on the Environmental Assessment circulated as part of the NEPA review process, not to address a particular fire risk that SDG&E or any other agency identified.<sup>201</sup> The EIR states that the Forest Service determined “additional fire risk reduction measures within the CNF (including fire hardening) and additional undergrounding *should be evaluated* as part of the MSUP review process.”<sup>202</sup> It does not state that the Forest Service identified a particular fire risk from power lines.

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<sup>195</sup> Pub. Resources Code § 21080(e); *Woodward*, 150 Cal.App.4th at 705.

<sup>196</sup> *Woodward*, 150 Cal.App.4th at 717.

<sup>197</sup> D.16-05-038 at 36.

<sup>198</sup> POC Op. Br. at 12-15; ORA Protest at 3, 6 (citing SDG&E Appl. vol. I at 2-6 and vol. II at 33-35 (no specific exigencies described requiring the CNF Projects), 5 (the Application “fails to state specifically what fire threats the existing [] 69 kV power lines and 12 kV distribution line and related facilities pose in the CNF that necessitate the CNF Projects”)).

<sup>199</sup> ORA Protest at 7; POC Protest at 3.

<sup>200</sup> POC Op. Br. at 12-15; ORA Protest at 3, 6 (citing SDG&E Appl. vol. I at 2-6 and vol. II at 33-35 (no specific exigencies described requiring the CNF Projects), 5 (the Application “fails to state specifically what fire threats the existing [] 69 kV power lines and 12 kV distribution line and related facilities pose in the CNF that necessitate the CNF Projects”)).

<sup>201</sup> EIR at A-6; Transcript at 19-24 (SDG&E, Knowd).

<sup>202</sup> EIR at A-6 (emphasis added).

The EIR's Fire and Fuels Management section discusses the history of fires and potential fuel sources in this region without providing information regarding the magnitude of current risks.<sup>203</sup> In fact, state fire data indicates that fire suppression efforts in San Diego have successfully contained most vegetation fires in recent years.<sup>204</sup> Indeed, SDG&E's Fire Program Manager testified that SDG&E has experienced a significant decline in the number of wildfires in the Project service area over the last five years, as a result of improved vegetation management, a comprehensive fire prevention plan, system hardening, and the fact that SDG&E is now "paying attention."<sup>205</sup> The region's fire history does not demonstrate that there is any existing fire risk posed by potential line failure that good management practices—i.e., more "paying attention"—would not address.

Further, the EIR's discussion of benefits of steel poles over wood poles is unsubstantiated and fails to address relevant risks. It states that the new steel poles will be "designed to withstand extreme wind-loading," while the existing wood poles "were designed for historical wind-loads."<sup>206</sup> However, the EIR includes no indication that wind loads are expected to differ from the "historical" winds that the wood poles are designed to withstand. Moreover, the EIR also states that both wood and steel poles are designed to retain structural integrity in high-wind environments, and only blow over in rare cases.<sup>207</sup> And, as Errata #2 and the Decision state, the newly articulated purpose of the Project is "not to build a power line that is fire proof."<sup>208</sup> The EIR states that steel poles vary less in strength and design, so their use will result in "improved system reliability and safety," but it does not provide evidence that pole variability poses any significant risks – i.e. it does not demonstrate that any existing variability has caused or is likely to cause fire or reliability problems.<sup>209</sup> Likewise, the EIR claims that wood poles are more susceptible to failure or pole fires resulting from lightning strikes than steel poles, but provides

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<sup>203</sup> EIR at D.8-2 to D.8-8.

<sup>204</sup> EIR at D.8-4.

<sup>205</sup> Transcript at 64:4-12, 66:2-8, 67:16-68:11, 82:10-16 (SDG&E, Mortier). Ironically, these factors mirror the Vegetation Management alternative that the EIR rejects as infeasible. *See* EIR at C-20.

<sup>206</sup> EIR at D.8-45.

<sup>207</sup> EIR at D.8-7.

<sup>208</sup> Errata #2; D.16-05-038 at 27.

<sup>209</sup> EIR at D.8-45.

no facts to support this statement.<sup>210</sup> And finally, the EIR notes that the proposed taller poles will allow for increased conductor spacing and ground clearance.<sup>211</sup> However, it provides no evidence that the increases in conductor spacing could not be achieved without pole replacement, and it does not indicate that current ground clearance is insufficient to protect against fire risks when areas surrounding lines are properly maintained.

Errata #2 makes the Commission's statement of overriding considerations even less appropriate. Only a handful of the major fires within the Project area in the last century were linked to power line failure.<sup>212</sup> As parties noted throughout this proceeding, Forest Service data show that of the 1,626 fires on Forest Service lands within the Cleveland National Forest from 1970 to 2007, only 29 (1.8%) were power-line related fires.<sup>213</sup> The Commission's Consumer Protection Safety Division found that at the time of two recent major fires, SDG&E had failed to comply with GO 95 fire safety measures.<sup>214</sup> One of those fires was caused by conductor contact that likely resulted from SDG&E's failure to maintain the minimum conductor separation required by GO 95.<sup>215</sup> Another was caused by a tree limb that fell and contacted a conductor, as a result of SDG&E's failure to trim the offending tree, in violation of GO 95.<sup>216</sup> The EIR does not provide evidence or support a reasonable assumption that power lines in the Project area pose any unusual fire risk, if maintained in accordance with GO 95. Thus Commission has no reason to give particular weight to a Project that will "reduce the risk of wildfire due to powerline failure."<sup>217</sup>

SDG&E's testimony presented no additional evidence of steel poles' superior strength or fire resistance, nor did they conducted any engineering research or scientific investigation of the benefits of steel over wood that would support the vague statements about Project benefits in the

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<sup>210</sup> EIR at D.8-45 to D.8.-46; *cf* Rahn Testimony at 5, 7 (stating steel poles are inferior to wooden poles in numerous respects, including because the "risk of line failure and catastrophic loss increases with steel poles versus wooden poles," since "steel poles experience catastrophic failure at much lower temperatures" (above 500 degrees Celsius) than wooden poles).

<sup>211</sup> EIR at D.8-46.

<sup>212</sup> EIR at D.8-5 to D.8-6.

<sup>213</sup> ORA Protest at 5-6; Response to Comments at D6-10.

<sup>214</sup> ORA Protest at 5-6; CNFF and Backcountry Op. Br. at 22-23; POC Reply Br. at 9; EIR at D.8.7, D.8-25 to D.8.-26.

<sup>215</sup> Investigation of the Witch Fire Near Santa Ysabel, California (Oct. 2007) at 5.

<sup>216</sup> Investigation of the Rice Fire Fallbrook, California (Oct. 2007) at 7; EIR at D.8-7.

<sup>217</sup> See D.16-05-038 at 29 (citing Errata #2 description of Project purpose).

EIR.<sup>218</sup> SDG&E Fire Program Manager Hal Mortier’s testimony claims that the objectives the Commission identified for the Project are essentially equivalent to a statement of overriding considerations because they identify “important public health and safety objectives.”<sup>219</sup> Not so. These are simply the Commission’s objectives for the purpose of guiding consideration of alternatives, as required by CEQA.<sup>220</sup> Just because the Commission identified goals for the Project, based on SDG&E’s application, does not mean there are significant benefits associated with achievement of those objectives. Such circular logic would lead agencies to approve all proposed projects, simply because their proponents wanted to complete them. Further, when asked whether he had investigated how steel poles perform in wildfire conditions, Mr. Mortier stated “I did not.”<sup>221</sup> Similarly, when asked whether he had researched whether the scientific or engineering literature shows a preference for steel over wood, he stated “I did not.”<sup>222</sup>

In contrast, the parties’ testimony actively calls SDG&E’s weak Project benefits claims into question. For example, Mr. Powers’s testimony notes that fewer than 3% of the existing 69 kV line poles that the Project will replace have been identified as requiring replacement in the near-term.<sup>223</sup> Further, Dr. Rahn’s testimony states that the risks associated with power line-related fires described in the FEIR “would have been minimized by the responsible party’s (e.g., SDG&E’s) compliance with GO 95, as well as other risk mitigation measures of CALFIRE, the Forest Service, and SDG&E’s own initiatives.”<sup>224</sup> He also raises concerns that SDG&E’s transition to steel poles may de-incentivize necessary vegetation management and result in an increase in wildfire risks.<sup>225</sup> Dr. Rahn’s statement that “[t]o the extent benefits exist, they may be partially or wholly offset by increased risk of lightning strikes to steel poles” also draws the reliability of statements in the EIR into question.<sup>226</sup> He observes that “[g]iven that the vast

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<sup>218</sup> Transcript at 85:4-26 (SDG&E, Mortier). Indeed, as Dr. Rahn testified, few studies have critically evaluated the costs and benefits of steel poles. Rahn Testimony at 5.

<sup>219</sup> Prepared Direct Testimony of Timothy M. Knowd and Hal R. Mortier on Behalf of SDG&E (Sept. 16, 2015) (“SDG&E Testimony”) at 4.

<sup>220</sup> See D.16-05-038 at 4, fn. 3 (noting the Commission identified its objectives as required by CEQA for the purposes of screening and assessing potential alternatives).

<sup>221</sup> Transcript at 85:10-14 (SDG&E, Mortier).

<sup>222</sup> Transcript at 85:19-25 (SDG&E, Mortier).

<sup>223</sup> Powers Testimony at 14.

<sup>224</sup> Rahn Testimony at 4-5.

<sup>225</sup> Rahn Testimony at 5.

<sup>226</sup> Rahn Testimony at 5.

majority of wildfires are caused by humans, the installation of steel poles only increases this human impact by artificially raising the potential for focused lightning strikes directly on utility infrastructure.”<sup>227</sup> Similarly, he notes that steel poles can lose tensile strength and galvanizing when exposed to fire, which cuts against statements in the FEIR regarding the performance of wood and steel poles in fires.<sup>228</sup> Additionally, he states steel poles may mask losses in structural integrity.<sup>229</sup> Finally, he predicts that “risk of failure and catastrophic loss increases with steel poles versus wooden poles,” because steel poles experience catastrophic failure at lower temperatures.<sup>230</sup>

In light of the weight of evidence in the record demonstrating an absence of Project benefits, the Decision indicates that the Commission did not “weigh[] . . . the evidence to fairly estimate its worth.”<sup>231</sup> The record does not contain evidence of Project benefits, so the Decision cannot be based on evidence that supports the conclusion that the Project benefits outweigh the significant environmental impacts of the Project. The findings of fact and conclusions of law do not demonstrate the extent to which wood-to-steel pole conversion would reduce relevant fire risks or improve reliability.<sup>232</sup> Thus, the Commission’s Decision approving a project that serves no identified need and would significantly harm air quality violates CEQA.

**b. The Commission Improperly Excluded Evidence Demonstrating a Lack of Project Benefits.**

The record’s lack of even minimal information about any need for fire hardening or reliability improvements follows from the Commission’s active exclusion of evidence of Project benefits (and lack thereof) from the record. POC and ORA’s protests requested evidentiary hearings to develop the record for this proceeding,<sup>233</sup> in accordance with GO 131-D, which requires the Commission to consider the “existence and feasibility of alternatives to the project, and the benefits of the project . . . in deciding whether to grant or deny the permit to construct.”<sup>234</sup> Likewise, the CEQA Guidelines explain that evidence of overriding considerations

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<sup>227</sup> Rahn Testimony at 5.

<sup>228</sup> Rahn Testimony at 7.

<sup>229</sup> Rahn Testimony at 7.

<sup>230</sup> Rahn Testimony at 7.

<sup>231</sup> *County of San Diego*, 148 Cal.App.3d at 555.

<sup>232</sup> See D.16-05-038 at 35-38.

<sup>233</sup> POC Protest at 3; ORA Protest at 7.

<sup>234</sup> GO 131-D § IX(B)(5).

is not limited to the EIR, but is instead “based on the final EIR *and/or other information in the record*.”<sup>235</sup> CEQA thus expressly invites post-Final EIR evidence of (1) a project’s “economic, legal, social, technological, or other benefits,” and (2) whether those specifically identified benefits of the Project “outweigh the unavoidable adverse environmental effects.”<sup>236</sup> This evidence is particularly critical because an “agency’s unsupported claim that the project will confer general benefits is [*not*] sufficient.”<sup>237</sup> Even the Commission’s own internal guidance notes that project need is relevant to determining whether a statement of overriding considerations is warranted in PTC proceedings.<sup>238</sup> However, the Commission only requested testimony on two narrow issues,<sup>239</sup> and it excluded testimony relevant even to those issues.<sup>240</sup> This left the Commission with the improperly narrow record on which it purportedly based the Decision.

Evidence excluded from the record demonstrates that the Project is unnecessary and steel poles do not provide significant fire resistance or reliability benefits. For example, Dr. Rahn noted that steel poles would not lower fire risk more than proper vegetation management.<sup>241</sup> Further, taller poles increase the likelihood of mid-line slap, contrary to the claims in the EIR.<sup>242</sup> Dr. Rahn also identified several low-cost improvements available for wooden poles that could address any legitimate concerns related to wood poles.<sup>243</sup> These issues are not, as the Decision implies, distinct from the fire hardening objective. This testimony goes directly to the credibility and sufficiency of the scant evidence in the EIR, so it should not have been stricken.

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<sup>235</sup> CEQA Guidelines § 15093(b) (emphasis added); *Sierra Club*, 10 Cal.App.4th at 1223-24 (finding the statement of overriding considerations “substantively infirm” because assertions in the statement lacked evidentiary support in the record).

<sup>236</sup> CEQA Guidelines § 15093(a).

<sup>237</sup> *Woodward Park*, 150 Cal.App.4th at 717.

<sup>238</sup> Commission Energy Division, April 6, 2012, “CEQA Energy Division First Friday Form,” PowerPoint presentation, slide 17, attached as Exhibit A (PTC application review does not normally require review of need and cost, but “[n]eed may become an issue if there are overriding considerations.”).

<sup>239</sup> Scoping Memo at 11-13; First Amended Scoping Memo at 4-8.

<sup>240</sup> *See* Ruling Denying Motion to Amend Scope.

<sup>241</sup> Rahn Testimony at 6.

<sup>242</sup> Rahn Testimony at 6.

<sup>243</sup> Rahn Testimony at 9.

**c. The Commission's Finding that the Project Will Provide Economic Benefits Is Not Supported by Substantial Evidence.**

The Decision also states the Project will “provide economic and environmental benefits by allowing SDG&E to continue operating its electric facilities by avoiding the cost, delay and potential environmental impacts of re-routing its facilities outside the Cleveland National Forest.”<sup>244</sup> However, the Commission cannot consider economic benefits of the Project without weighing the extraordinarily large cost of the Project. The Project’s minimum \$418.5 million cost is higher than the estimated cost for over 95% of projects that the CAISO has deemed necessary to improve reliability and efficiency.<sup>245</sup> According to the 2011-2012 ISO Transmission Plan, only 9 (6.7%) of the 134 transmission projects approved by the CAISO had estimated cost above \$50 million.<sup>246</sup> In light of the weight of evidence in the record demonstrating the Project will be extremely expensive, the Decision indicates that the Commission did not weigh the evidence of the Project’s purported economic benefits against the Project costs “to fairly estimate its worth.”<sup>247</sup>

**d. The Commission Failed to Adequately Weigh the Project’s Significant Environmental Impacts.**

On the other side of the overriding considerations scale, the Decision does not clearly identify and weigh the environmental impacts of the Project that it would approve. It states that the environmentally superior alternative would avoid the Project’s significant impacts to land use and reduce the significant impacts to visual resource.<sup>248</sup> However, then it rejects parts of this alternative as infeasible and adopts portions of the federal preferred alternative.<sup>249</sup> The Commission cannot demonstrate that it considered the “relative magnitude” of the impacts versus the purported benefits, because the Decision does not make findings regarding the impacts of the Project it actually approved.<sup>250</sup>

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<sup>244</sup> D.16-05-038 at 36-37.

<sup>245</sup> ORA Protest at 7.

<sup>246</sup> ORA Protest at 7.

<sup>247</sup> *County of San Diego*, 148 Cal.App.3d at 555.

<sup>248</sup> D.16-05-038 at 35-36.

<sup>249</sup> D.16-05-038 at 37.

<sup>250</sup> *See Woodward Park*, 150 Cal.App.4th at 718.

**V. Request for Oral Argument**

Pursuant to Rule 16.3, POC and CNFF request oral argument for this Application for Rehearing. The Decision presents legal issues of exceptional public importance because it will likely cost ratepayers \$1 billion and cause significant impacts to air quality in the CNF region. If the Commission continues to adhere blindly to the voltage cut-off for the PTC process and ignore project cost and need, even for extremely expensive projects, this is likely to harm ratepayers. Oral argument is therefore warranted.

**VI. Conclusion**

For the foregoing reasons, POC and CNFF request that their application for rehearing be granted.

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